

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION THIRTY-THREE**

KROGER LIMITED PARTNERSHIP,
d/b/a HILANDER FOODS

Employer 1/

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1546

Petitioner

DECISION AND DIRECTION OF ELECTION

Case 33-RC-4715

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, 2/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/

3. The labor organization involved claims to represent certain employees of the Employer. 4/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 5/ 6/

All full-time and regular part-time employees, including pharmacy technicians, service desk clerk, pricing clerks, produce clerks, bakery clerks, grocery clerks, seafood clerks, deli clerks, floral clerks, video clerks, cashiers, baggers, health and beauty aides, fuel center employees, and coffee shop and maintenance employees, but excluding watchmen, guards, office clerical employees, meat department employees and meat department managers, store and commissary managers, merchandising coordinator, ASP clerk, store and commissary department heads (managers), including pharmacy, produce, deli, bakery, grocery, floral, video, health and beauty, seafood, and front end, and all other supervisors, as defined in the Act, employed at the following facilities: Store 855, located on Hononegah Road, Roscoe, Illinois; Store 805, located in Cherry Valley, Illinois; Store 858, located on Mulford Road, Rockford, Illinois; Store 859, located on Main Street, Rockford, Illinois; Commissary 849, located on Main Street, Rockford, Illinois; Store 860, located on Alpine Road, Rockford, Illinois; and Store 861, located on Rural Street, Rockford, Illinois.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. 7/ Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1546.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Company**, 394 U.S. 759 (1969).8/ Accordingly, it is hereby directed that within 7 days of the date of this Decision two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge for Subregion 33 who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the *33rd Subregion, Hamilton Square, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois, 61602*, on or before October 4, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by October 11, 2002.

Dated September 27, 2002
at: Peoria, Illinois



/s/
Will J. Vance, Acting Regional Director
Subregion 33

1/ The Employer's name appears as amended at the hearing.

2/ The Employer is an Ohio Corporation engaged in the retail grocery business at its Rockford, Illinois, area facilities. During the past calendar year, a representative period of time, the Employer received in excess of \$500,000 in gross revenues and purchased and received goods valued in excess of \$50,000 directly from vendors located outside the State of Illinois.

3/ The parties stipulated that the Petitioner is a labor organization within the meaning of the Act, and I so find. No collective bargaining agreement covers any of the employees in the unit found appropriate herein and the parties stipulated that there is no contract bar. Furthermore, there is no history of collective bargaining affecting any of these employees.

4/ The Petitioner seeks a unit of all full time and regular part time employees, including pharmacy technicians, service desk, pricing clerks, produce clerks, bakery clerks, grocery clerks, seafood clerks and all others in the department, deli clerks, floral clerks, video clerks, cashiers, baggers, health and beauty aides, and all others in the department including the Health and Beauty Aid Department Manager, Seafood Manager, and coffee shop and maintenance employees, employed at the Employer's store located at 4860 Hononegah Road, Roscoe, Illinois, but excluding the office clerical, meat department employees and meat manager, watchmen, store manager, Company manager, and all other department heads (managers), including pharmacy, produce, deli, bakery, grocery, floral, video, front end and all other guards and supervisors, as defined in the Act [sic]. The Employer contends that the only appropriate unit is multi-facility. For the reasons set forth below, I find that a multi-facility unit is an appropriate unit and the Health and Beauty Aid Department Heads/Managers and Seafood Heads/Department Managers should be excluded. There are approximately 550 full-time and/or regular part-time employees in the unit found appropriate herein. The parties stipulated that college students working for the Employer may vote subject to challenge.

SCOPE OF THE UNIT

In 1998, Kroger Limited Partnership, d/b/a Highlander Foods (herein the Employer) acquired the five existing Rockford-area Highlander Food Stores, as well as a Highlander Commissary facility also located in Rockford, Illinois. Since acquiring the Highlander Food Stores and Commissary in 1998, the Employer has continued to operate the Highlander Food Stores, as well as the Highlander Commissary facility, under the Highlander Foods name. In December 2000, the Employer opened a sixth Rockford-area grocery store under the Highlander Foods Store name. This Highlander store is located at or near the CherryVale Mall, in Cherry Valley, Illinois – an area adjacent to Rockford, Illinois.

The Employer owns and operates the following Rockford-area Highlander facilities:

Store 805 located in Cherry Valley, Illinois; Store 855 located on Hononegah Road in Roscoe, Illinois (the petitioned for store); Store 858 located on Mulford Road in Rockford, Illinois; Store 859 located on Main Street, Rockford, Illinois; Store 860 located on Alpine Road, Rockford, Illinois, Store 861 on Rural Street, Rockford, Illinois; The Food Commissary 849 located in Store 859 on Main Street, Rockford Illinois.

All stores have the same job classifications and all employees have the same skills. All the stores and the commissary sell or stock the same merchandise, operate under a common budget and marketing plan, and all are subject to common oversight and direction. All the Highlander stores and the commissary are located within 13 miles of the store in Roscoe, Illinois.

Each store and the commissary has a manager, as well as one or two co-managers/customer service managers, and a front-end manager. The parties stipulated that all department managers/heads, except the health and beauty department managers and the seafood department managers, are supervisors within the meaning of Section 2(11) of the Act.

The Employer's merchandising coordinator, Vern Harp, has overall budgetary, marketing, merchandising and operational responsibility for the six food stores and the commissary. The area support personnel clerk (ASP) is Felicia Pearson. The parties agree that the merchandising coordinator and ASP clerk should be excluded from any unit found appropriate herein.

The six stores and the commissary all operate under a single budget, which is separate and distinct from other Kroger-owned operations located throughout the country. The merchandising coordinator produces this budget by obtaining input from store managers, and the commissary manager. The budget proposal is submitted to Kroger's operations department, located in Cincinnati, Ohio, for final approval. All the stores and the commissary operate under a common marketing/merchandising plan that is separate and distinct from that of Kroger-owned stores in other areas. The Employer's merchandising coordinator prepares the marketing/merchandising plan. Once the marketing/merchandising plan is approved by Kroger, the Employer places advertising flyers in Rockford area newspapers, and ensures that the six stores and the commissary follow the plan and feature the items so advertised. The merchandising coordinator visits each of the six stores and the commissary on a routine basis, checking their displays and inventory. Store managers have no authority to deviate from the marketing/merchandising plan.

The merchandising coordinator has overall responsibility for labor relations at the six stores and the commissary. He hires and promotes all supervisors and managers at the six stores and the commissary and he ensures that they and their subordinates comply with the Employer's various policies and procedures. The Employer's policy is to promote from within based on job performance and qualifications. Job openings for promotion to managerial or supervisory positions are posted at all of the Employer's six facilities. The postings are prepared by the ASP clerk, under the direction of the merchandising coordinator. Employees interested in promotions are directed to contact the ASP clerk. Between the years 2000 and 2002, 17 employees were promoted by the merchandising coordinator to

managerial/department head positions. Each of the persons so promoted was transferred from one store to another.

While individual store managers are generally responsible for hiring associates within their stores, there are exceptions. The Employer's merchandising coordinator is generally responsible for overseeing and/or approving transfers. Employees and managerial personnel are routinely transferred from one of the Employer's Highlander stores to another, either on a temporary or permanent basis, to fill in for one-another during vacations, etc. When the CherryVale store opened in the year 2000, a number of employees were temporarily assigned to work at the CherryVale store to train and mentor the CherryVale facility's new hires. Additionally, employees were permanently transferred to the CherryVale store from the Employer's other Rockford, Illinois, Highlander stores so that the CherryVale facility would have a permanent core group of experienced employees. Employees are also permanently transferred based on changes in sales volume. Since 1999, at least 34 employees received permanent lateral job transfers from one of the six stores to another. Since 1999, four store employees were transferred from the Roscoe store and permanently reassigned to positions at one of the other Rockford area stores.

The merchandising coordinator is ultimately responsible for ensuring all of the Employer's employees in the Rockford, Illinois, area comply with the Employer's personnel policies and procedures. He ensures that all employees are paid based on identical wage schedules and receive identical benefits. All employees have the same benefits including health and insurance benefits, Kroger stock purchase plan options, educational assistance benefits, 401(k) retirement plan benefits, pension benefits and service award benefits. Wages and benefits are determined by Kroger's Human Resources Department, located in Indianapolis, Indiana, based on Kroger's "multiple statistical analysis" (MSA) of the Rockford-area job market. Only the merchandising coordinator, or his superiors within the Kroger system, have authority to deviate from the common wage schedule.

The Employer maintains the same personnel policies and a personnel handbook for all its employees at the subject stores. These policies and the handbook are generally unique to these facilities and do not generally apply to other Kroger-owned facilities located throughout the country. All employees have the same dress code and are required to wear Kroger identity tags. All employees are subject to the same equal employment opportunity policy, work schedule policy, common break, meal and vacation policies, common jury leave, sick leave, family medical leave and funeral leave policies, common safety policies, and a common Employer-wide seniority policy. In addition, the Employer maintains a common layoff and seniority rights policy; employees are laid off according to their overall Employer seniority and not their individual store seniority. The Employer has a policy of progressive discipline and a dispute resolution process, which apply to all of its employees. Employees bring their grievances/complaints first to their department managers. If their disputes cannot be resolved at that level, employees may then seek redress from their store managers. If still not resolved, employees may seek redress from the merchandising coordinator. If he cannot resolve the matter, they may then seek redress from Kroger's Human Resources Department, located in Indianapolis. Similarly if employees are disciplined, they can appeal that decision following the same chain of command.

The merchandising coordinator is also responsible for running the Employer's "shrink team." The shrink team is composed of the merchandising coordinator, employees and managers from the six stores and the ASP clerk. The team is responsible for reducing financial losses stemming from theft, product spoilage, etc. The merchandising coordinator conducts periodic meetings with store managers and shrink team members to discuss shrinkage. The meetings are generally held at his Alpine Street office in Rockford. Those attending discuss reports/audits received from the shrink team, as well as from the store managers and/or the Kroger central office. They also discuss findings of shrink audits personally performed by the merchandising coordinator at the various facilities. During these

meetings, the merchandising coordinator also receives and discusses reports from the Employer's ASP clerk regarding her findings during her cash and "front-end" audits routinely conducted by her at the six stores and the commissary. The shrink team members look for commonalties between the different stores and attempt to address/reduce shrinkage on an Employer-wide basis.

Managerial Duties Of the Employer's Area Support Personnel "ASP" Clerk: Ms.

Felicia Pearson is the person currently employed by the Employer as its ASP clerk. The ASP clerk handles human resource issues and is responsible for providing area personnel support for all the Employer's subject facilities. She routinely answers questions from employees relating to their pay, insurance, and benefits, etc. If she cannot answer these questions, the ASP clerk contacts the Kroger human resources department in Indianapolis to obtain the information necessary to do so. The ASP clerk is also responsible for dealing with customer returned checks. These are referred to her by store managers. She then contacts customers who have had checks returned because of insufficient funds. The ASP clerk also handles customer complaints. When a customer calls with a problem/complaint, if the store manager/co-manager on duty is unable to resolve it, the customer is referred to the ASP clerk for assistance. The ASP clerk takes the complaint, researches it and then either responds directly to the customer or has the merchandising coordinator do so.

The ASP clerk serves as a member of the "shrink team." She performs weekly "front end audits" and/or "front end observations" at all the stores. She also conducts weekly cash audits of all the stores. These audits/observations usually last between one and two hours and require the ASP clerk to physically observe the cashiers and baggers (i.e., "front end" employees) at each of the Employer's stores, monitoring them for compliance with the Employer's customer relations and shrinkage policies. She evaluates "front end" employees for their customer service efforts, bagging techniques, etc., making sure all the Employer's policies and procedures are followed. Kroger and/or the merchandising coordinator establish

these procedures, and store managers and employees may not deviate from them. While conducting her observations/audits, the ASP clerk also looks for signs of shrinkage. Once her observations are completed, the ASP clerk fills out a two-page report, has the cashiers and baggers sign it, and then provides the report to the store managers and/or co-managers who are on duty. She then discusses the report with the store manager/co-manager, explaining what she observed and makes suggestions for improvement. The store managers/co-managers then sign the report, a copy is given to them and the report is provided to the merchandising coordinator for discussion at his periodic shrink team meetings and/or meetings with the store managers.

The ASP clerk conducts mandatory customer service training for all newly hired employees. This training is usually provided at the Employer's central office facility, located on Alpine Street in Rockford; the training lasts about two hours and is usually held two or three times per week. All new employees from all the Employer's subject facilities attend the training together. The training is designed to familiarize employees with the Employer's customer service policies as well as the Employer's dress code policy. If an employee is not complying with the Employer's customer service procedures, the employee is retrained.

All employees participate in a number of Employer-wide events, including company picnics, contests and charitable events. The ASP clerk coordinates the Employees' participation in the community charitable events that are either sponsored by or participated in by the Employer. Some of these charitable causes require mandatory employee participation, some are voluntary. The ASP clerk, seeks maximum employee participation. The ASP clerk requires all cashiers to solicit donations from customers for muscular dystrophy causes. All employees are encouraged to participate in the United Way and other charitable causes. The ASP clerk conducts meetings for all employees to discuss such programs.

Managerial Responsibilities Of the Employer's Store Managers/Co-Managers:

Subject to review and approval of the merchandising coordinator, store managers have the

authority to hire and fire employees and to discipline them. They also may recommend that certain employees receive merit pay and/or service pay raises. The merchandising coordinator generally approves these recommendations. Store managers are required by the Employer to ensure that employees assigned to their stores comply with the Employer's policies and procedures. They have the authority to create their own in-store safety rules, as well as to ensure that employees assigned to their stores comply with these rules. Store managers prepare performance evaluations of employees, and have the authority to make in-store transfers of employees between departments, and, subject to general Kroger directions, to establish employee break, work and vacation schedules. They can authorize overtime and time off for non-managerial/supervisory employees. Under the direction of their merchandising coordinator, they perform shrink team duties, including audits of their own stores and, on occasion, of other Hilander stores, as well. They also directly supervise their co-managers, front-end managers and department heads. The stores have one or two co-managers. They routinely assist the store manager with the performance of his/her duties, performing essentially the same type of duties as the store managers. When store managers are on vacation, or when they are otherwise absent, the co-managers assume their duties.

Front-End Managers and Department Heads/Managers: All the stores and the commissary have a number of department heads/managers. Depending on the location, the department heads include pharmacy, produce, deli, video, floral, bakery, grocery, health and beauty aid, and seafood.

Health And Beauty Aid Department Managers/Drug GM Managers: The Petitioner, contrary to the Employer, seeks to include the Employer's health and beauty aid department managers in any unit found appropriate in an appropriate unit at the Roscoe Store.

The Employer has a health and beauty aid department manager, otherwise known as a "Drug GM" manager, at each of the six stores. All of the health and beauty aid department managers or "Drug GM" managers perform the same duties and have essentially the same

responsibilities as one another. They are responsible for scheduling the work hours of employees assigned to their departments, the general merchandising of their departments, ad planning, performing employee appraisals, and disciplining their assigned personnel. All the stores operate on a twenty-four hour basis, and each health and beauty aid/Drug GM department is open during this same twenty-four hour period. The health and beauty aid/Drug GM departments account for approximately 13 percent of the Employer's overall revenue.

Gloria West is the health and beauty aid/Drug GM department managers for Store 855, located in Roscoe, Illinois. She normally works between 7:00 A.M. to 3:00 or 4:00 P.M., Monday through Friday, as well as some Saturdays. She makes approximately \$11.40 per hour. When Ms. West is absent or on vacation, health and beauty aid/Drug GM department managers from other stores are assigned to fill-in for her at the Roscoe location. Ms. West attends weekly ad planning meetings of department managers at the Roscoe Store; employees do not attend these meetings.

Ms. West has two employees working in her department who work different shifts than Ms. West. These employees make between \$9.00 and over \$10.00 per hour. Ms. West has the authority to assign and to schedule the employees' hours, their time off and vacations. She may recommend to the store manager that employees work overtime. Ms West interviews job applicants and recommends which applicant to hire. She may recommend merit pay increases and the store manager usually follows her recommendations. Ms. West has authority to discipline employees and on at least one occasion in the year 2002, she issued a written reprimand to a third-shift employee who did not report for work. She has authority to recommend discharges and/or layoffs. She prepares employees' performance evaluations based on the employee's quality and quantity of work. She has the authority to adjust employee grievances.

Seafood Department Manager: The Petitioner, contrary to the Employer, seeks to include the Employer's seafood department managers in any unit found appropriate. The seafood department managers are responsible for scheduling employee work hours and are responsible for the general merchandising in the departments, including ordering from outside vendors the seafood sold at the stores and setting the cases. They conduct employee appraisals and discipline their assigned personnel. The seafood department managers also attend weekly board meetings of department managers; employees do not attend these meetings.

The seafood departments are open from about 10:00 A.M. to 7:00 P.M. each day. Irene Lott is the seafood department manager for store 855, located in Roscoe, Illinois. She makes approximately \$11.40 per hour. There is one employee in the seafood department. This employee makes approximately \$7.00 or so per hour. She assigns work to the employee and schedules the employee's hours, time off and vacations. She has authority to recommend that employees be assigned overtime by the store manager, and the authority to interview new hires, recommend the hiring/non-hiring of the persons she interviews, and recommend that existing employee(s) receive merit pay increases. Generally, her recommendations are followed by the store manager. Ms. Lott has authority to discipline employees and the authority to recommend discharges and/or layoffs of persons assigned to her department. In three years, Ms. Lott has not exercised her disciplinary authority, however Ms Lott prepares annual employee performance evaluations for employees assigned to her department based on the quality and quantity of the employees' work, customer service skills, appearance, attitude, etc. She has the authority to adjust grievances, provided they are related to her areas of responsibility.

DISCUSSION:

The facts above and the record as a whole establish that the employees at the Employer's Roscoe, Illinois, facility do not have a community of interest sufficiently distinct

from that of the employees in the other six facilities so as to warrant the establishment of a separate unit as requested by the Petitioner. Although a single store unit is presumptively appropriate, this presumption can be rebutted. The Board has looked to a number of factors including central control of labor relations, conditions of employment, supervision, skills, degrees of operational integration, geographical proximity, and contact and interchange of employees. See *Big Y Foods, Inc.*, 238 NLRB 860 (1978) where the Board held that three retail liquor stores, located within about a twenty mile radius of one another, constituted an appropriate unit where they had centralized administrative, human resource, financial and merchandising control, as well as common employment policies, insurance benefits, holiday/sick leave, and allowed permanent transfers between stores. See also *Kirlin's Inc. of Central Illinois*, 227 NLRB 1220 (1977) (where individual store managers are required to strictly adhere to established policies and guidelines of Employers', Board will find lack of autonomy at single-store level); *Nakash, Inc., d/b/a V.I.M.*, 271 NLRB 1408 (1984) (individual store manager's authority limited where next level of management has final decision making authority in terms and conditions of employment). And see *Star Market Co.*, 172 NLRB 1393 (1968) where the Board found appropriate a multi facility unit of five grocery stores, even though they were separated by up to fifty-seven miles, where they had centralized operational functions handled by the division's main office located in one of the stores. See also *Acme Markets, Inc.*, 328 NLRB 1208 (1999); *Scolari's Warehouse Markets, Inc.*, 319 NLRB 153 (1995); *The Kendall Company*, 184 NLRB 847 (1970); *Kent Plastics Corp.*, 183 NLRB 612 (1970); *Gustave Fisher*, 256 NLRB 1069 (1981); and *Airco, Inc.*, 273 NLRB 348 (1984).

The record establishes the central control of labor relations for all the Employer's six stores and the commissary. All administrative services are centrally controlled and the Employer's human resources department serves all seven Hilander facilities. This central control is illustrated by the shared terms and conditions of employment of all the employees.

All employees are subject to the same personnel policies, employee handbook, safety and training programs and wage and benefit programs. Although the employees at the seven facilities have separate direct supervision, this day-to-day supervision is circumscribed by these common personnel policies, as well as by the merchandising coordinator and ASP clerk, who routinely visit each facility at least once a week. The employees at all seven facilities attend common training and have very similar skills. All of the facilities have similar layouts, and sell similar – if not identical – product lines. They operate under a common budget and are susceptible to common audits and audit procedures. Functionally, the Roscoe store is an integral part of the Employer's entire Hilander operation. The Roscoe store receives its bakery products from the commissary which serves as the Employer's product and fixtures warehouse. The commissary transfers its products to the stores when they run short. The Roscoe store and other Rockford-area stores/commissary are within the same Rockford MSA and all are within about 13 or so miles from one another.

There is frequent employee contact and interchange between the Roscoe facility and the Employer's other six facilities. Employees attend training together at the Employer's central office. All employees attend various meetings together, including shrink team meetings where they develop common shrink prevention strategies. The Employer's newsletter is sent to all the Employer's employees. Employees participate in common company-sponsored contests and community service projects; they meet together to plan company sponsored community service projects, the Employer's annual picnics, and other company sponsored parties, etc. Employees routinely drive between the stores and the commissary delivering product. Employees from one store routinely fill-in for employees at the other stores on a temporary basis when there are vacations, and there has been a significant number of permanent employee transfers. Accordingly, as a result, I find that a multi-facility unit, rather than a Unit limited to the Roscoe store is appropriate. *Waipahu Super Mart*, 226 NLRB 180 (1976).

HEALTH AND BEAUTY AID DEPARTMENT MANAGERS/DRUG GM MANAGERS

AND SEAFOOD DEPARTMENT MANAGERS: The Petitioner contrary to the Employer contends that health and beauty aid department manager(s)/drug GM department manager(s) and the seafood department manager(s) should be included in any unit found appropriate herein. The Employer maintains that these managers are supervisors within the meaning of Section 2(11) of the Act. There are approximately 12 managers at issue.

Section 2(11) is to be interpreted in the disjunctive and if an employee possesses just one of the indicia of supervisory authority listed in 2(11), that individual is a supervisor. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. denied 335 U.S. 908 (1948); *Harborside Healthcare Inc.*, 330 NLRB 1334 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Allen Services Co.*, 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995). Persons with the power “effectively to recommend” the actions described in Section 2(11) are supervisors within the statutory definition. See *Entergy Systems & Service*, 328 NLRB 902 (1999); *Detroit College of Business*, 296 NLRB 318 (1989); and *Westwood Health Care Center*, 330 NLRB 935 (2000). The burden of establishing supervisory status rests on the party asserting that status. *NLRB v. Kentucky River Community Care*, 121 S. Ct. 1861, 1866–1867 (2001), *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998), and *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535 fn. 8 (1999).

While the number of employees health and beauty aid/Drug GM department heads/managers and seafood department heads/managers supervise is limited, the totality of the evidence clearly indicates that they are supervisors, as defined in the Act. They have authority to direct the work of those assigned to their departments and make/issue them work assignments. See *Wal-Mart Stores*, 335 NLRB No. 1013 (2001) and *Westinghouse*

Broadcasting Co., 188 NLRB 157 (1971). Likewise, they have the authority to assign or effectively recommend the assignment of overtime, as well as to administer discipline and make effective hiring recommendations for those employees assigned – or about to be assigned - to their departments. See *Venture Industries*, 327 NLRB 918 (1999) and *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972). They also complete annual written performance evaluations of employees assigned to their departments and evidence indicates that these employees are eligible to receive merit raises based on their evaluated performance. See *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995). For these reasons, I find that the Employer's Health and Beauty Aid/Drug GM Department Heads/Managers and Seafood Department Heads/Managers are supervisors, as defined in the Act and are properly excluded from the unit.

6/ The Petitioner's showing of interest is inadequate with respect to the unit found appropriate herein. As the appropriate unit is broader than that sought by the Petitioner, the Petitioner is hereby granted 10 days from the date of issuance of this Decision to establish a proper showing of interest in the unit found appropriate herein. Such showing of interest should be presented to the Board's Subregion 33 office in Peoria, Illinois. In the event that the Petitioner has not established a proper showing of interest within 10 days, the petition herein shall be dismissed. If the Petitioner does establish a proper showing of interest within that time, an election will be conducted in the Unit found appropriate. If the Petitioner does not wish to proceed with an election herein, it may withdraw its petition without prejudice upon a written notice to the Board's Subregion 33 office in Peoria within 7 days from the date of the issuance of this Decision. *Propane Transport, Inc.*, 247 NLRB 966, 969 (1980).

7/ Your attention is directed to Part 103, Subpart B, Section 103.20 of the Board's Rules and Regulations, Series 8, as amended, which provides, inter alia, that employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election, that failure to do so shall be

grounds for setting aside the election whenever proper and timely objections are filed, and that an employer shall be estopped from objecting to nonposting or late posting of Notices unless it notifies the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received the Notices. You may wish to review the above rule in its entirety so that you are fully aware of its complete contents and the obligations imposed by it.

8/ The full first and last names and addresses of all eligible voters must be filed by the employer. *North Macon Health Care Facility*, 315 NLRB 359 (1994).

Classification Index Code: **440-3325, 440-1760-3420**

Date Issued: 9/27/02